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The Fifth Amendment as a Limitation on the Public Trust Doctrine in Water Law

We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.

Justice Oliver Wendell Holmes¹

In the summer of 1983 the California Supreme Court held, in *National Audubon Society v. Superior Court*,² that the public trust doctrine preserves the continuing sovereign power of the state to protect uses for water deemed to be in the public interest.³ The power of the state to protect these "public trust uses" bars any party from claiming vested water rights that harm the public trust.⁴ This imposes a perpetual duty on the state to take public trust uses into consideration in allocating water resources.⁵

The public trust doctrine as formulated in *National Audubon Society* allows the state to reconsider allocation decisions that permit harm to come to the *res* of the trust, even though the initial allocation decisions were made after due consideration of their effect on the public trust.⁶ If the state finds that vested water rights⁷ harm the public trust, the state may reconsider those rights to accommodate the changing public needs.⁸ This power to reconsider *vested* water rights is a new facet to the public trust doctrine.⁹

1. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

2. 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346, *modified*, 33 Cal. 3d 726a, *cert. denied*, 104 S.Ct. 413 (1983).

3. *Id.* at 447, 658 P.2d at 728, 189 Cal. Rptr. at 365.

4. *Id.* at 425-26, 658 P.2d at 712, 189 Cal. Rptr. at 349.

5. *Id.* at 447, 658 P.2d at 728, 189 Cal. Rptr. at 365.

6. *See id.*

7. "No vested rights bar such reconsideration." *Id.* at 447, 658 P.2d at 729, 189 Cal. Rptr. at 365.

8. *Id.*

9. *See generally*, CONFERENCE PROCEEDINGS, THE PUBLIC TRUST DOCTRINE IN NATURAL RESOURCE LAW AND MANAGEMENT (H. Dunning, ed. 1981); Eikel & Williams, *The Public Trust Doctrine and the California Coastline*, 6 URB. LAW. 519 (1974); Littman, *Tidelands: Trusts, Easements, Custom and Implied Dedication*, 10 NAT. RESOURCES LAW. 279 (1977); Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473 (1970); Comment, *Public Access and the California Coastal Commission; A Question of Overreaching*, 21 SANTA CLARA L. REV. 395 (1981); Comment, *California's Tideland Trust*

The *National Audubon Society* decision is merely advisory because no vested rights to use water have been affected directly. The decision only resolves the legal conundrum¹⁰ of two competing systems of thought that seemingly suggest opposite results—the public trust doctrine and the doctrine of prior appropriation of water.¹¹ Lawsuits have been filed invoking the public trust doctrine of *National Audubon Society* as a basis for reducing the existing supply of water available for use.¹² If a vested water right is reduced or extinguished because of incompatibility with public trust uses, the question arises whether the fifth amendment¹³ to the United States Constitution protects the water rights holder by entitling him to compensation for the loss. The California Supreme Court in *National Audubon Society* suggested that it would reject a claim that these reductions constitute takings for which compensation is required. “We do not divest anyone of title to property: the consequence of our decision will be only that some land owners . . . will . . . hold [their property] subject to the public trust.”¹⁴ This circumvention of the fifth amendment command to compensate is the central theme of this comment.

Using the *National Audubon Society* controversy as a building block, a Model Scenario will be constructed. This Model Scenario will be used to probe the consequences of the public trust doctrine as defined in *National Audubon Society*. The Model Scenario will test the power of the state to reconsider allocation decisions in spite of vested water rights against the standards of the fifth amendment.¹⁵ The analysis

for Modifiable Public Purposes, 6 LOY. L.A.L. REV. 485 (1973); Note, *California's Tideland Trust: Shoring It Up*, 22 HASTINGS L.J. 759 (1971) (for other views on the public trust doctrine).

10. 33 Cal. 3d at 452, 658 P.2d at 732, 189 Cal. Rptr. at 369.

11. *Id.* The case presently is pending in the United States District Court for the Eastern District of California, No. Civil S 80-127 LKK.

12. *Delta Water Cases*, Coordination Proceeding, No. 548, is pending before the San Francisco Superior Court. *South Delta Water Agency, et al. v. United States et al.*, Civil No. S 82-567 MLS, is pending in the United States District Court for the Eastern District of California. See Amicus Curiae Brief of the Metropolitan Water District of Southern California in Support of Petition for Writ of Certiorari to the Supreme Court of the State of California, No. 83-300, at 6 n.5.

13. U.S. CONST. amend. V, in part states: “. . . nor shall private property be taken for public use without just compensation.” The taking clause of the fifth amendment is made applicable to the states through the fourteenth amendment, which provides: “. . . nor shall any state deprive any person of life, liberty, or property without due process of law.” U.S. CONST. amend. XIV, §1; *San Diego Gas & Elec. v. City of San Diego*, 450 U.S. 621, 636 (1981) (Brennan, J., dissenting), *citing*, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980); *Chicago B.&Q. R. Co. v. Chicago*, 166 U.S. 226, 239, 241 (1897). The California Constitution provides: “Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has been paid to, or into court for, the owner.” CAL. CONST. art. I, §19.

14. 33 Cal. 3d at 440, 658 P.2d at 723, 189 Cal. Rptr. at 360.

15. See *infra* notes 149-66 and accompanying text.

then will focus on the public trust doctrine as a means to avoid the compensation requirement.¹⁶ Avoidance of the compensation requirement will be shown to be premised on the water rights holder having prior notice of expectations by the public that are incompatible with his expectations regarding his right to use the water.¹⁷ This comment will conclude by arguing that without this prior notice a reduction of water rights as permitted by the *National Audubon Society* decision is a taking¹⁸ requiring compensation.¹⁹ The starting point for this analysis, and for construction of the Model Scenario, is a brief description of the *National Audubon Society* controversy and the environs of the volcanically conceived Mono Lake.

MONO LAKE

Mono Lake, the second largest lake in California,²⁰ sits at the base

16. See *infra* notes 167-79 and accompanying text.

17. See *infra* notes 180-237 and accompanying text.

18. Whether the reduction of water rights is a taking requiring compensation or an invalid regulation, in which case compensation is not available as a remedy, is beyond the scope of this comment. In California, compensation is not available as a remedy. *Agins v. City of Tiburon*, 24 Cal. 3d 266, 272, 598 P.2d 25, 28, 157 Cal. Rptr. 372, 375 (1979), *aff'd on other grounds*, 447 U.S. 255, 262-63 (1980). A California state regulation can be tested through declaratory relief or mandamus. *Id.* at 273, 598 P.2d at 31, 157 Cal. Rptr. at 375. If the regulation is found to be excessive, it would be invalidated as unconstitutional. See *id.* Money damages, however, would not be available for the decrease in the value of the property during the time the regulation was in force. See *id.* The Court of Appeals of New York has taken the same approach ruling that, although a regulation may impose "so onerous a burden" that it effectively deprives all use of the property, that deprivation does not constitute a taking requiring compensation, but rather "amounts to a deprivation or frustration of property rights without due process of law and is therefore invalid." *Fred F. French Investment Co. v. City of New York*, 385 N.Y.S.2d 5, 8-9, 350 N.E.2d 381, 384-85, *cert. denied*, 429 U.S. 990 (1976). Several other states endorse this view. See Bowden & Feldman, *Take It or Leave It: Uncertain Regulatory Taking Standards and Remedies Threaten California's Open Space Planning*, 15 U.C. DAVIS L. REV. 371, 375 n.18 (1981). Late in the nineteenth century the United States Supreme Court appeared to be propounding this view. See *Mugler v. Kansas*, 123 U.S. 623, 668-69, (1887); *Stoebuck, Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057, 1060 n.18 (1980). In March 1981, however, a four member minority of the present Court indicated that "the Constitution demands that the government entity pay just compensation for the period commencing on the date the regulation first effected the 'taking' and ending on the date" the regulation ceases. *San Diego Gas & Elec. v. City of San Diego*, 450 U.S. 621, 653 (1981) (Brennan, J., dissenting). Justices Stewart, Marshall, and Powell joined in Justice Brennan's dissent. Justice Rehnquist would have had "little difficulty in agreeing with much of what [was] said in the dissenting opinion." *Id.* at 633. He joined the opinion of the Court, however, dismissing the case for want of a final judgment. *Id.* at 636. The United States Supreme Court does not appear inclined to adopt the California approach. The California approach affects only the remedy available, not the underlying question of whether the regulation is invalid. Because of this anomaly in California taking analysis, this comment will refer to a regulation that is excessive as a taking requiring compensation, with the understanding that, at present, the California courts would merely invalidate the regulation. 24 Cal. 3d at 273, 598 P.2d at 28, 156 Cal. Rptr. at 375.

19. See *infra* notes 239-75 and accompanying text.

20. *National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 424, 658 P.2d 709, 711,

of the Sierra Nevada Mountain Range.²¹ Because the lake has no outlet,²² it has become saline from eons of evaporation.²³ Nonetheless, Mono Lake remains a natural feeding and breeding ground for several species of nesting and migratory birds.²⁴

With the surface of the lake above 6000 feet,²⁵ the lake receives little water from rain and snowfall.²⁶ Most of the water in the lake comes from snowmelt²⁷ via the five fresh water streams, Mill, Leeving, Walker, Parker and Rush Creeks,²⁸ that rise near the west of the Sierra Nevada Mountain Range and carry the runoff to the west shore of the lake.²⁹ The appropriation of the water from these streams generated the *National Audubon Society* controversy.³⁰

Between 1920 and 1934, the City of Los Angeles Department of Water and Power purchased the riparian³¹ rights incident to the above creeks³² and the littoral³³ rights to Mono Lake itself.³⁴ After investigations and hearings,³⁵ the Division of Water Resources³⁶ approved applications for water rights submitted by the City of Los Angeles Department of Water and Power (hereinafter referred to as DWP) in 1934.³⁷ Permits were granted to appropriate the waters of Walker, Rush, Parker, and Leeving Creeks.³⁸ The permits required that the water be used for municipal use and hydroelectric power generation.³⁹ In 1941, the necessary works were completed to bring 70,000 acre-

189 Cal. Rptr. 346, 348 (1983).

21. *Id.*

22. *Id.*

23. *Id.* at 429, 658 P.2d at 715, 189 Cal. Rptr. at 352.

24. *Id.* at 424, 658 P.2d at 711, 189 Cal. Rptr. at 348.

25. *Id.* at 429, 658 P.2d at 714, 189 Cal. Rptr. at 351.

26. *Id.* at 424, 658 P.2d at 711, 189 Cal. Rptr. at 348.

27. *Id.*

28. *Id.*

29. *Id.*

30. See *City of Los Angeles v. Aitken*, 10 Cal. App. 2d 460, 462, 52 P.2d 585, 585-86 (1935); *National Audubon Society*, 33 Cal. 3d at 431, 658 P.2d at 716, 189 Cal. Rptr. at 353.

31. Belonging or relating to the bank of a river or stream; of or on the bank. BLACK'S LAW DICTIONARY 1192 (5th ed. 1979).

32. 33 Cal. 3d at 427 n.4, 658 P.2d at 713 n.4, 189 Cal. Rptr. at 350 n.4.

33. Belonging to the shore, as of seas and great lakes. BLACK'S LAW DICTIONARY 842 (5th ed. 1979).

34. See 33 Cal. 3d 419, 427, 658 P.2d 709, 713, 189 Cal. Rptr. 346, 350.

35. Petition For Writ of Certiorari to the Supreme Court of the State of California, No. 83-300, at 4 [hereinafter referred to as Petition].

36. The Division of Water Resources was the predecessor agency to the California Water Resources Board. 33 Cal. 3d at 424, 658 P.2d at 711, 189 Cal. Rptr. at 348.

37. Petition, *supra* note 35, at 4.

38. Appendix To Petition For Writ of Certiorari to the Supreme Court of California, No. 83-300, at A-93-A-104 [hereinafter referred to as Appendix].

39. *Id.* at A-93, A-99.

feet of the water to Los Angeles each year.⁴⁰ In the 1960s a second set of water works was constructed to divert an additional 30,000 acre-feet per year.⁴¹ These additional facilities were put to use in June 1970.⁴² After inspection by the State Water Resources Control Board, on May 2, 1973,⁴³ licenses were issued to DWP. These licenses confirmed that the Mono Basin appropriate water rights had become perfected and vested by use⁴⁴ in DWP.

The effect of these diversions was both immediate and dramatic.⁴⁵ The prediversion area of the lake, 85 square miles, had shrunk to 60.3 square miles.⁴⁶ The surface elevation of the lake had dropped 43 feet.⁴⁷ Islands which had been nesting grounds for California Gulls became peninsulas.⁴⁸ Mountain predators, gaining access over land bridges, made easy prey of the gull chicks.⁴⁹ Negrit Island, once the most popular nesting site, experienced a sharp decline in the number of gull nests after coyotes reached the island.⁵⁰ Outraged at the impending environmental holocaust, National Audubon Society, Friends of the Earth, the Mono Lake Committee, and the Los Angeles Audubon Society sued DWP to enjoin the Mono Basin diversions.⁵¹ Plaintiffs filed suit in superior court to enjoin the diversions alleging that the shores, bed, and waters of Mono Lake are protected by the public trust.⁵² After removal to federal court,⁵³ the action was stayed, under the abstention doctrine,⁵⁴ to allow the California courts to resolve state issues.⁵⁵ The Alpine County Superior Court entered summary judgment against the plaintiffs.⁵⁶ The California Supreme Court then took the case on a petition for mandate.⁵⁷

40. Petition, *supra* note 35, at 4.

41. *Id.*

42. *Id.*

43. Appendix, *supra* note 38, at A-93, A-99.

44. See *id.* at A-93-A-104.

45. 33 Cal. 3d at 428, 658 P.2d at 714, 189 Cal. Rptr. at 351.

46. *Id.* at 429, 658 P.2d at 714, 189 Cal. Rptr. at 351.

47. *Id.*

48. *Id.* at 424, 658 P.2d at 711, 189 Cal. Rptr. at 348.

49. *Id.* at 430, 658 P.2d at 716, 189 Cal. Rptr. at 353.

50. *Id.*

51. National Audubon Society v. Department of Water and Power of the City of Los Angeles, Alpine County Superior Court, No. 566 (1979).

52. National Audubon Society, 33 Cal. 3d at 431, 658 P.2d at 716, 189 Cal. Rptr. at 348.

53. *Id.* at 431, 658 P.2d at 716-17, 189 Cal. Rptr. at 353.

54. Appendix, *supra* note 38, at A-59-A-76.

55. 33 Cal. 3d at 431-32, 658 P.2d at 717, 189 Cal. Rptr. at 353. Abstention in the federal court was based on Louisiana Power and Light Co. v. City of Thibodaux, 360 U.S. 25 (1959), and Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 539 (1968). See Appendix, *supra* note 38, at A-61.

56. Petition, *supra* note 35, at 8.

57. National Audubon Society, 33 Cal. 3d at 425, 658 P.2d at 712, 189 Cal. Rptr. at 349.

The California Supreme Court first reviewed the purpose⁵⁸ and scope⁵⁹ of the public trust doctrine in California. The court concluded that the public trust doctrine protects navigable waters from harm caused by diversions of nonnavigable tributaries.⁶⁰ Additionally, the court stated that the statutory permit system used for the allocation of appropriative rights is not independent of the public trust doctrine.⁶¹ Rather, the two are parts of an integrated system of water law.⁶² This integrated system mandates continuing supervision by the state over the appropriation and use of water.⁶³ Past allocation decisions, which may be inappropriate given current knowledge or needs, must give way to this current supervisory obligation, even when those decisions have given due consideration to their effect on the public trust.⁶⁴

The issue confronted is whether the prior notice component of the public trust doctrine is adequate to circumvent the compensation requirement of the fifth amendment.⁶⁵ The next section will construct a Model Scenario as a device for exploring this elusive area⁶⁶ of the law. Based on the facts and disputes in *National Audubon Society*,⁶⁷ the Model Scenario will juxtapose the compensation requirement and the public trust doctrine.

MODEL SCENARIO

An examination of a set of circumstances that will be used throughout this comment to measure the public trust doctrine against the compensation guarantee of the fifth amendment follows. The Model Scenario consists principally of the facts in *National Audubon Society*.⁶⁸ A few changes will be made to enhance the analytical usefulness of this tool.

First, the property holder in the Model Scenario is a private entity. This eliminates any speculation that the California Supreme Court could justify the readjustment of property rights without compensa-

58. *Id.* at 434-35, 658 P.2d at 719, 189 Cal. Rptr. at 356.

59. *Id.* at 435-38, 658 P.2d at 719-20, 189 Cal. Rptr. at 356-57.

60. *Id.* at 436, 658 P.2d at 721, 189 Cal. Rptr. at 357.

61. *See id.* at 452, 658 P.2d at 732, 189 Cal. Rptr. at 369.

62. *Id.*

63. *Id.* at 447, 658 P.2d at 728, 189 Cal. Rptr. at 365.

64. *Id.*

65. U.S. CONST. amend. V. *See supra* note 18.

66. The United States Supreme Court has stated that it was "unable" to develop any "set formula" for taking analysis. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

67. *National Audubon Society*, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983).

68. *See id.*; *supra* notes 20-64 and accompanying text.

tion because the rights belong to a nebulous population of several million⁶⁹ or because Los Angeles is not entitled to due process protection.⁷⁰

The second change in the *National Audubon Society* facts is one of procedure. Assumed as a fact in the Model Scenario is that the California State Water Resources Control Board⁷¹ (hereinafter referred to as WRCB) has reconsidered⁷² the vested water rights of the water rights holder. This reconsideration resulted in a readjustment of the water rights to the total exclusion of the water rights holder.⁷³ In other words, the WRCB will have determined that the use of the water consistent with the terms and conditions of the license will inflict an intolerable harm on the public trust uses of Mono Lake.

The Model Scenario sets forth one additional procedural change. In the Model Scenario, the water rights holder has appealed⁷⁴ the decision of the WRCB to the California Supreme Court. In turn, the court has upheld the decision of the board asserting that the water rights holder was not divested of title but retained title subject to the public trust.⁷⁵ The question left to be resolved is whether this exercise of the public trust is a taking requiring compensation.

This Model Scenario is a contrived fact situation but is not unrealistic. The City of Los Angeles, or many private water rights holders in California, could be facing this very scenario in the near

69. The population of the City of Los Angeles is estimated to be 2.9 million. THE 1980 CENSUS OF POPULATION, U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, CHARACTERISTICS OF THE POPULATION, NUMBER OF INHABITANTS-CALIFORNIA 6-22 (1980). The population of the County of Los Angeles is estimated to be 7.4 million. *Id.* at 6-11. The population of the Los Angeles Standard Consolidated Statistical Area is estimated to be 11.5 million. *Id.* at 6-35.

70. See generally, *City of Trenton v. State of New Jersey*, 262 U.S. 182, 188 (1923) (municipalities have no due process protection against acts of the state legislature which has the power to create and abolish them). Los Angeles has argued that since the state courts do not have the power to create and abolish municipalities due process protection is available to Los Angeles who is seeking to sustain a legislative act. Petition, *supra* note 35, at 26 n.9.

71. Currently, this is the California agency that makes decisions regarding applications for permits to divert and use water. See CAL. WATER CODE §§179, 1003.5, 1254.

72. See 33 Cal. 3d at 447, 658 P.2d at 728, 189 Cal. Rptr. at 365.

73. A 1979 study recommended that withdrawals from Mono Lake not exceed 15,000 acre-feet annually. *Id.* at 429 n.9, 658 P.2d at 714-15 n.9, 189 Cal. Rptr. at 351 n.9. That would require Los Angeles to reduce withdrawals by 85 percent. See Petition, *supra* note 35, at 4. The Model Scenario assumes a 100 percent reduction is necessary to protect public trust uses. This eliminates analytical difficulties regarding the extent of the diminution in value. See generally 4 NICHOLS ON EMINENT DOMAIN §13.23 (3rd ed. 1981) (regarding valuation of water rights for taking purposes).

74. See CAL. WATER CODE §1360.

75. The California Supreme Court has suggested this would be the judicial response. See 33 Cal. 3d at 438-40, 658 P.2d at 722-23, 189 Cal. Rptr. at 359-60; *supra* note 14 and accompanying text.

future.⁷⁶ Because the Model Scenario is not completely hypothetical, the question whether readjustment of vested water rights requires compensation is of critical importance. The next section discusses this constitutional issue, focusing on the taking analysis of the fifth amendment,⁷⁷ as it pertains to water rights.

TRADITIONAL TAKING ANALYSIS

The constitutional guarantee that private property is not to be taken without just compensation⁷⁸ was designed to prevent the government from imposing public burdens on some people alone when, in all fairness and justice, those burdens should be borne by the public as a whole.⁷⁹ The idea that the public should pay for public benefits is not unique to American jurisprudence. Due process protection of property rights is rooted in English law.

A. *Origins of the Taking Clause*

Protection from the expropriation of private property by the sovereign has its genesis, in Anglo-Saxon jurisprudence, in the Magna Carta.⁸⁰ "No freeman shall be deprived . . . of his freehold . . . unless by the lawful judgment of his peers and by the law of the land."⁸¹ The English nobles' fear that the king would seize⁸² their land for his own use was subdued by that language.⁸³ As were the English nobles, the common law was most concerned with property rights in land.⁸⁴ The protection of property rights in American jurisprudence has not been limited to land.

B. *Evolution of Taking Analysis*

The prohibition against taking private property without just com-

76. Southern California Edison Company, a private entity, owns water rights in the Mono Basin including appropriative water rights held under permits and licenses granted by the State of California. Brief in Support of Petition for Writ of Certiorari to the Supreme Court of the State of California, No. 83-300 at 3 (brief filed by Southern California Edison Company).

77. U.S. CONST. amend V.

78. *Id.*

79. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

80. F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE* 56 (1973).

81. *Id.* The original Magna Carta contained 63 articles. The quoted portions were extracted from article 39. By 1225 the charter had been consolidated into 37 articles of which the quoted matter was number 29. *Id.*

82. *Id.* at 319.

83. *Id.* at 55-60.

84. Deveney, *Title, Jus Publicum, and the Public Trust: An Historical Analysis*, 1 SEA GRANT L. J. 13, 39 (1976).

pensation, in large part, has narrowed to an examination of the controlling elements of the fifth amendment.⁸⁵ These elements are the concepts of "property" and "taking."⁸⁶ The first of these concepts to be examined is "property,"⁸⁷ with an emphasis on its relation to water rights.

1. Water Rights Defined

Two doctrines governing water rights exist: prior appropriation and riparianism.⁸⁸ Appropriation water law resolves water disputes according to the maxim of equity, *qui prior est in tempore, potior est injure*,⁸⁹ first in time is first in right.⁹⁰ The rule of priority protects those who are using the water against others who commence use later.⁹¹ Rights to use water are distributed on a priority basis until the supply is exhausted. Persons with new demands must purchase rights⁹² from the existing water rights holders. Modernly, appropriative rights are governed by statutes and state administrative agencies.⁹³

Riparian rights originated in the common law.⁹⁴ Each riparian landowner on a stream has a right to make reasonable use of the water. Upper riparians may not interfere unreasonably with that use.⁹⁵ Riparian water law assumes enough water for all if the right to use the water is restricted to reasonable use by riparian owners.⁹⁶ Modernly, statutes govern water rights even in riparian states.⁹⁷

Appropriative and riparian rights inherently are antagonistic, but several states recognize both.⁹⁸ Appropriative and riparian rights are usufructuary⁹⁹ in nature and are limited by the doctrine of reasonable

85. See Stoebe, *supra* note 18, at 1083.

86. *Id.*

87. See *infra* notes 88-126 and accompanying text.

88. F. TRELEASE, *WATER LAW* 10 (3d ed. 1979).

89. *Irwin v. Phillips*, 5 Cal. 140, 147 (1855).

90. He who is before in time is the better in right. Priority in time gives preference in law. BLACK'S LAW DICTIONARY 1125 (5th ed. 1979). See *infra* note 216.

91. TRELEASE, *supra* note 88, at 11.

92. *Id.*

93. *Id.*

94. *Id.* at 10.

95. *Id.* at 10-11.

96. *Id.* at 11.

97. *Id.* at 12.

98. California, Nebraska, Kansas, Mississippi, North Dakota, Oklahoma, Oregon, South Dakota, Texas, and Washington. Only in California and Nebraska may a new use be initiated by exercising riparian rights. *Id.* at 11-12.

99. See R. CLARK, *WATERS AND WATER RIGHTS* 349-50 (1967); 1 W. HUTCHINS, *WATER RIGHTS IN THE NINETEEN WESTERN STATES* 441 (1971); C. KINNEY, *IRRIGATION AND WATER RIGHTS* 769-73 (2d ed. 1912); 1 H. ROGERS & A. NICHOLS, *WATER FOR CALIFORNIA* 191 (1967); see also *National Audubon Society*, 33 Cal. 3d at 441, 658 P.2d at 724, 189 Cal. Rptr. at

use.¹⁰⁰ While California has a water rights scheme that contemplates both appropriative and riparian rights,¹⁰¹ the Model Scenario encompasses only appropriative rights.¹⁰² Although appropriative water rights are usufructuary, they are nonetheless property protected by the fifth amendment.

2. *Water Rights are Property*

The term "property" as used in the fifth amendment " . . . denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. . . . The constitutional provision is addressed to every sort of interest the citizen may possess."¹⁰³ The right to use water is the "sort of interest" that has received protection.

Early in the history of California water law, the right that an appropriator obtained was held to be private property subject to ownership and disposition by him as with other kinds of private property.¹⁰⁴ California courts have termed appropriative water rights "substantive and valuable property,"¹⁰⁵ generally recognizing that they constitute "an interest in realty."¹⁰⁶ Appropriative rights are appurtenant to the land on or in connection with which the water is used.¹⁰⁷ They pass with the property when deeded without specific mention of them.¹⁰⁸

Modernly, appropriative rights are granted through a state system

361; *Seneca Consolidated Gold Mines v. Great Western Power Co.*, 209 Cal. 206, 215, 287 P. 93, 96 (1930); *Gould v. Eaton*, 117 Cal. 539, 542-43, 49 P. 577, 578 (1897); *Eddy v. Simpson*, 3 Cal. 249, 252 (1853).

100. CAL. CONST. art. X, §2, in part provides: "[T]he waste or unreasonable use or unreasonable method of use of water . . . [shall] be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the public interest of the people and for the public welfare."

101. 33 Cal. 3d at 441, 658 P.2d at 724, 189 Cal. Rptr. at 361; *People v. Shirokow*, 26 Cal. 3d 301, 307, 605 P.2d 859, 864, 162 Cal. Rptr. 30, 34 (1980); W. HUTCHINS, *THE CALIFORNIA LAW OF WATER RIGHTS* 40, 55-57 (1956); TRELEASE, *supra* note 88, at 10-12.

102. The argument advanced in this comment would apply to riparian rights also. The analysis would follow a different path because, unlike appropriative rights, riparian rights are not specific in character. See TRELEASE, *supra* note 88, at 10-12.

103. *United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945).

104. *Thayer v. California Development Co.*, 164 Cal. 117, 125, 128 P. 21, 24 (1912); see *Hoffman v. Stone*, 7 Cal. 46, 49 (1857); *Tartar v. Spring Creek Water & Min. Co.*, 5 Cal. 395, 399 (1855); 1 HUTCHINS, *supra* note 99, at 151.

105. *McDonald v. Bear River & Auburn Water & Min. Co.*, 13 Cal. 220, 232 (1859).

106. *Wright v. Best*, 19 Cal. 2d 368, 382, 121 P.2d 702, 711 (1942); see *Hill v. Newman*, 5 Cal. 445, 446 (1855).

107. 3 HUTCHINS, *supra* note 99, at 191.

108. *Witherhill v. Brehm*, 47 Cal. App. 286, 295, 240 P. 529, 538 (1925).

of permits¹⁰⁹ and vested licenses¹¹⁰ for use. After completion of the structures necessary to divert the water, and upon proof that the water is being put to reasonable and beneficial use in accordance with the permit, a California permittee is entitled to a license. This license confirms his vested right to divert and use the water.¹¹¹ Licenses, by definition, are revocable.¹¹² A California water license may be revoked, however, only for failure to comply with the conditions stated in the license¹¹³ or for failure to put the water to useful or beneficial use.¹¹⁴ As long as these conditions are met, the water right is a private right subject to ownership¹¹⁵ and disposition by the owner, just as other private property.¹¹⁶

Unlike other private property, however, a water right is not a general right to the use of the property. The right to use water is defined precisely and narrowly¹¹⁷ and is granted by the state¹¹⁸ only after public notice¹¹⁹ and deliberation by the WRCB regarding the propriety of the proposed appropriation.¹²⁰ The licenses granted to DWP are illustrative.¹²¹

3. *Specific Nature of the Property*

The WRCB issued to DWP a right to a specific amount of water¹²² diverted from four specific tributary creeks¹²³ at specific points of

109. See CAL. WATER CODE §§102, 1252, 1254-56, 1350, 1380, 1390, 1394, 1410, 1450, 1455, 1611.

110. See *id.* §§1600, 1610, 1627, 1675.

111. See *id.* §1610.

112. O. BROWDER, R. CUNNINGHAM, J. JULIN & A. SMITH, BASIC PROPERTY LAW 553 n.1 (3d ed. 1979).

113. CAL. WATER CODE §§1611, 1627, 1675.

114. *Id.* §1240; see *County of Amador v. State Board of Equalization*, 240 Cal. App. 2d 205, 213, 49 Cal. Rptr. 448, 454 (1966); *Mt. Shasta Power Corp. v. McArthur*, 109 Cal. App. 171, 192, 292 P. 549, 558 (1930), *aff'd*, 9 Cal. 2d 751, 778 (1937). Water unused for a period of five years reverts to the public and is regarded as unappropriated public water. CAL. WATER CODE §1241.

115. See CAL. WATER CODE §102.

116. See *supra* notes 104-08 and accompanying text.

117. CAL. WATER CODE §§1253, 1255-57, 1625-29.

118. *Id.* §§1450, 1455, 1610, 1611.

119. *Id.* §§1300, 1301, 1310-17, 1320-24, 1330.

120. *Id.* §§1250, 1251, 1253, 1258, 1350.

121. See Appendix, *supra* note 38, at A-93-A-104.

122. License No. 10191, amount not to exceed 167,800 acre-feet per calendar year. *Id.* at A-94. License No. 10192, amount not to exceed 200 cubic feet per second by direct diversion and 89,200 acre-feet per annum by storage. *Id.* at A-100.

123. Leevining Creek, Walker Creek, Parker Creek, and Rush Creek. *Id.* at A-93, A-94, A-99, A-100.

diversion¹²⁴ for a specific purpose.¹²⁵ The right granted to DWP, however, was not a general property right to use the water. The water right owned by DWP is a custom-tailored right to divert a specific quantity of water for a specifically defined use granted by the state after deliberation. The narrow definition of modern water rights plays an important role in determining whether a taking has occurred.¹²⁶ The water rights holder in the Model Scenario, therefore, will be assumed to possess a license to divert a certain quantity of water from the Mono Basin for one specified use. A precise description of the water rights that are possessed by the water rights holder in the Model Scenario is irrelevant to the analysis in this comment, except that the licensed use must be one that consumes the water outside the Mono Basin. The history of fifth amendment jurisprudence as applied to American water law indicates that water rights are property protected by the taking clause. To determine if the public trust doctrine works a "taking," the ensuing discussion will examine that term as used in the fifth amendment.

C. The Concept of "Taking"¹²⁷

Most taking cases result from state regulation, therefore, the evolution of the taking concept commenced with the adoption of the fourteenth amendment.¹²⁸ For this reason a complete concept of a "taking" was not developed until the first Justice Harlan was on the United States Supreme Court.¹²⁹ Justice Harlan developed two modes of analyzing the taking clause. Based on a literal reading of the word "taking," Harlan's first mode of analysis argues that a regulation is not a "taking" when it involves only limitation upon use by the owner for purposes declared to be injurious to the community.¹³⁰ In

124. *Id.* at A-94-A-95, A-100-A-102.

125. *Id.*

126. *See supra* notes 117-26, *infra* notes 149-60 and accompanying text.

127. *See generally*, Baumgardner, "Takings" Under the Police Power-The Development of Inverse Condemnation as a Method of Challenging Zoning Ordinances, 4 SW. L.J. 723 (1976); Cunningham, Inverse Condemnation as a Remedy for "Regulatory Takings," 8 HASTINGS CONST. L.Q. 517 (1981); Mandelker, *Land Use Takings: The Compensation Issue*, 8 HASTINGS CONST. L.Q. 491 (1981); Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1 (1970); Note, *The Sovereign's Duty to Compensate for the Appropriation of Public Property*, 67 COLUM. L. REV. 1083 (1967); Note, *Just Compensation and the Public Condemnee*, 75 YALE L.J. 1053 (1966) (for views on the taking clause other than those cited).

128. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 38 (1964) [hereinafter referred to as *Takings*].

129. *Id.*

130. *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887); *Pennsylvania Coal Co. v. Mahon*,

this instance the regulation is a mere exercise of the state police power subject only to due process limitations.¹³¹ Harlan's second mode of analysis is a corollary of the first. When the regulation imposes a permanent physical invasion and a "practical ouster"¹³² of the owner's possession, a "taking" for which compensation is required has occurred.¹³³ Nuisance, physical invasion,¹³⁴ and appropriation of proprietary interest were the touchstones of Justice Harlan's concept of taking. By the first quarter of the twentieth century, government regulation in the areas of zoning, conservation, and business required reformulation¹³⁵ of the concept of taking. Justice Holmes was the principal architect of the reformulated taking concept.¹³⁶

Justice Holmes relied on a case by case resolution¹³⁷ of what he perceived to be the core of the fifth amendment conflict: public need versus private loss.¹³⁸ Only when the magnitude of the loss suffered rendered the affected property "wholly useless"¹³⁹ would private right prevail over public need.¹⁴⁰ Thus, the prevalent doctrinal application of the taking concept, the diminution of value theory,¹⁴¹ looks to the extent of economic loss as a criterion for determining whether government action is a taking requiring compensation.¹⁴²

In a recent pronouncement on the taking doctrine,¹⁴³ the United States Supreme Court refined the Holmes diminution of value theory. The inquiry focuses on the extent to which the property holders' ability to earn a reasonable rate of return¹⁴⁴ on his investment is impaired. Once the validity of the governmental interest asserted is shown, the

260 U.S. 393, 417 (1922) (Brandeis, J., dissenting); see *Takings*, *supra* note 128, at 38; *supra* note 18.

131. 123 U.S. at 668-69.

132. *Id.* at 668.

133. *Id.*

134. *Takings*, *supra* note 128, at 38-40. Physical invasion is still a valid test for whether or not a regulation is a taking. A recent United States Supreme Court decision held that "when the character of the government action is a permanent physical invasion of property, our cases have uniformly found a taking . . . without regard to . . . public benefit or . . . [the] minimal economic impact" of the regulation. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982).

135. *Takings*, *supra* note 128, at 40.

136. *Id.*

137. See *id.*

138. *Id.*

139. *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) (opinion by Holmes, J.).

140. *Id.*

141. *Takings*, *supra* note 128, at 151.

142. *Id.*

143. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

144. *Id.* at 137; see Note, *The Supreme Court, 1977 Term*, 92 HARV L. REV. 57, 230 (1978).

nature of the interest plays no further role in the taking analysis.¹⁴⁵ To be entitled to compensation, the property right holder must show that he is precluded from earning a reasonable rate of return on his investment¹⁴⁶ or that he has been deprived of distinct investment-backed expectations¹⁴⁷ that can be characterized as "primary expectation[s] concerning the use"¹⁴⁸ of his property.

D. Taking Analysis and Water Rights Adjustment

The primary expectations of the water rights holder in the Model Scenario are defined specifically in the license granting a vested right to the use of the water.¹⁴⁹ As postulated in the Model Scenario, the WRCB has determined that further use of the water as licensed must cease because the use imposes an intolerable burden on the public trust.¹⁵⁰ The decision of the WRCB, on first glance, does not appear to be a taking because it merely seems to place a limitation on the use of the water in favor of the public trust, leaving available alternative uses. Forcing a property rights holder, however, to limit the use of his property in a manner that harms the public trust is, in every sense, rendering the property right "wholly useless"¹⁵¹ when that property right is specifically defined¹⁵² in a way that the only legal use of the property necessarily harms the public trust.¹⁵³

In the Model Scenario, no legal use for the water right exists that will allow the water rights holder to earn *any* return on his investment, much less a reasonable return.¹⁵⁴ The water rights holder is deprived completely of any investment-backed expectations¹⁵⁵ and his primary expectations concerning the use of his property,¹⁵⁶ which are his *only* expectations,¹⁵⁷ are totally extinguished. Further, the diversion works from Mono Lake to the Owens Valley Aqueduct cannot be put to any alternative use.¹⁵⁸ This property also is rendered "wholly

145. Note, *supra* note 144, at 229.

146. *Id.* at 230.

147. *Id.*

148. 438 U.S. at 136.

149. See *supra* notes 122-26 and accompanying text.

150. See *supra* notes 71-73 and accompanying text.

151. *Hudson County Water Co.*, 209 U.S. at 355; see L. TRIBE, AMERICAN CONSTITUTIONAL LAW 460 (1978).

152. See *supra* notes 122-26 and accompanying text.

153. Unlike *National Audubon Society*, this is a presumed fact in the Model Scenario. See *supra* notes 71-76 and accompanying text.

154. See *supra* note 144 and accompanying text.

155. See *Penn Central*, 438 U.S. at 136-37; Note, *supra* note 144, at 230.

156. See *Penn Central*, 438 U.S. at 136.

157. See *supra* notes 151-54 and accompanying text.

158. See Appendix, *supra* note 38, at A-93, A-99.

useless" by the decision of the WRCB. Unlike real property which when restricted in one use may generate a reasonable rate of return on the investment in some alternative use,¹⁵⁹ no permissible alternative uses for the water exist.¹⁶⁰ The property right in the water effectively is destroyed.

Finally, a strong case could be made that because the decision of the WRCB physically takes the water from the Owens Valley Aqueduct, the water right has been invaded physically. Using this reasoning, any interference that limits the quantity of water to the material injury of the holder is more than mere regulation; it is a deprivation of a vested right¹⁶¹ constituting a taking requiring compensation.

Without the use of the public trust doctrine, the current exposition of the taking clause¹⁶² would require compensation¹⁶³ for a readjustment of the water right in the Model Scenario.¹⁶⁴ The public trust doctrine¹⁶⁵ avoids the taking issue by claiming a preexisting title¹⁶⁶ in the property in favor of the state. To understand how the "pre-existing title" theory circumvents the compensation guarantee of the fifth amendment, a close examination of the "preexisting title" theory is necessary.

REASSERTING A PREEXISTING TITLE

Claims of preexisting title are not new to natural resources law.¹⁶⁷ The techniques for using the preexisting title theory vary from state to state.¹⁶⁸ The concept has been most prevalent in protecting ocean

159. See *Penn Central*, 438 U.S. at 137; Costonis, *The Disparity Issue: A Context for the Grand Central Terminal Decision*, 91 HARV. L. REV. 402, 420 (1977).

160. Use of the water right is specified in the License. See Appendix, *supra* note 38, at A-93, A-99.

161. *Enterprise Irr. Dist. v. Willis*, 284 N.W. 326, 330 (Neb. 1939).

162. See *supra* notes 127-61 and accompanying text.

163. The restriction on the use of the property right in *Mahon* (compensation required) was less than that authorized by *National Audubon Society* as postulated in the Model Scenario. See *Mahon*, 260 U.S. at 412-13.

164. See *supra* notes 168-77 and accompanying text.

165. See *supra* note 9.

166. See BOSSELMAN, CALLIES & BANTA, *supra* note 80, at 309-13; see also Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NAT. RESOURCES J. 1, 23-25 (1963) (rejecting the "Notice Theory" of the origin of the federal navigational servitude).

167. Cf. *Light v. United States*, 220 U.S. 523, 537 (1911) (public land); *Winters v. United States*, 207 U.S. 564, 577 (1908) (reservation of water); *United States v. Trinidad Coal Co.*, 137 U.S. 160, 170 (1890) (land); Veeder, *Indian Prior and Paramount Rights to the Use of Water*, 16 ROCKY MTN. MIN. L. INST. 631, 640-41 (1971) (claims by Indians based upon aboriginal, paramount, and immemorial rights).

168. BOSSELMAN, CALLIES & BANTA, *supra* note 80, at 309.

shores.¹⁶⁹ A meaningful examination of the "preexisting title" theory as an exception to the guarantee to compensation must commence with an understanding of the underlying premise of the exception.

A. Premise of the Exception

The theoretical foundations for the "preexisting title" theory are nearly syllogistic. According to the theory, the state always has had a title in the property.¹⁷⁰ Property holders should have known¹⁷¹ the state had that preexisting title when they acquired their property. Therefore, when the state acts to reassert title to the detriment of the property holder, compensation is not required.¹⁷² Under the preexisting title theory, the need for compensation under the fifth amendment is obviated by prior knowledge of the preexisting title.¹⁷³ The reason compensation is not required is that if the property holder had notice of the preexisting title in the state, the reassertion of the rights in the title causes neither a change in the law,¹⁷⁴ nor a change in the structural rules under which the property holder was to make choices regarding expectations in his property rights.¹⁷⁵ If, however, announcement by the state that a preexisting title clouded the property holder's title is "so certainly unfounded that it may be regarded as essentially arbitrary"¹⁷⁶ or as constituting "a sudden change in state law, unpredictable in terms of relevant precedents,"¹⁷⁷ government action pursuant to that announcement constitutes a deprivation of property for which compensation is required.¹⁷⁸ The question whether

169. *Id.* at 309-10.

170. *National Audubon Society*, 33 Cal. 3d at 438-39, 440, 658 P.2d at 722, 723, 189 Cal. Rptr. at 359, 360.

171. *See* TRIBE, *supra* note 151, at 465; *see also* Morreale, *supra* note 166, at 23-25 (regarding the federal navigational servitude).

172. *See* 33 Cal. 3d at 438-39, 440, 658 P.2d at 722, 723, 189 Cal. Rptr. at 359, 360.

173. *See* Michelman, *Property, Utility, Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1239 (1967); 2 POMEROY, *TREATISE ON EQUITY JURISPRUDENCE* §591, at 1102 (4th ed. 1918).

174. *See* Buchanan, *Positive Economics, Welfare Economics and Political Economy*, 2 J. LAW & ECON. 124, 131-32 (1959).

175. *See id.*

176. *Enterprise Irr. Dist. v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164 (1917) (the alleged adequate state ground should not be deferred to).

177. *Hughes v. State of Washington*, 389 U.S. 290, 296 (1967) (Stewart, J., concurring).

178. *Cf. id.* (ruling that before the Supreme Court will defer to a determination by a state that an action is not a taking the Supreme Court must be satisfied that the reasoning of the state does not constitute "a sudden change in state law"); *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42-43 (1944) (whether the state determination "rests upon a fair or substantial basis"); *Broad River Power Co. v. South Carolina*, 281 U.S. 537, 543 (1929) (whether the state determination so departs from established principles as to be without substantial basis); *Fox River Paper Co. v. Railroad Comm'n of Wisconsin*, 274 U.S. 651, 656 (1927) (whether the state determination is a "novel view" inconsistent with earlier state court decisions); *Shelter*

compensation is required resolves itself into one of prior notice.¹⁷⁹ An examination of what the public trust obligates the state to protect and when a property holder may be said to be on notice will reveal that the water rights holder in the Model Scenario cannot be charged with notice sufficient to obviate the compensation guarantee.

B. Prior Notice

The compensation requirement may be dispensed with only if the property holder had prior notice—actual or constructive—that the state was obligated to protect public trust uses. Before this concept of prior notice can be explored fully, an understanding must be reached of what the public trust obligates the state to protect.

1. Res of the Public Trust

In 1892, the United States Supreme Court decided, in *Illinois Central Railroad Company v. Illinois*,¹⁸⁰ that the State of Illinois held title to the land under the navigable waters of Lake Michigan in trust for the people of Illinois.¹⁸¹ The *Illinois Central* decision is the progenitor of the public trust doctrine in American water law.¹⁸² The California Supreme Court decided *National Audubon Society* using the *Illinois Central* decision as primary authority¹⁸³ to impose limitations on the alienation of trust property.

The genesis of the public trust doctrine can be found in Roman civil law¹⁸⁴ and can be traced through the centuries to common-law traditions in England.¹⁸⁵ The characteristics of the Roman doctrine are vague. The common-law doctrine is known more precisely. Land under the navigable waters of England was dedicated to the king,

Framing Corp. v. Pension Benefit Guar., 705 F.2d 1502, 1513-16 (9th Cir. 1983) (striking down the Amendments Act, 29 U.S.C. §§1001-461 (1976), amending certain provisions of the Employee Retirement Income Security Act, as a violation of due process because the retroactive effects of the Amendments Act were "so wholly unexpected and disruptive that harsh and oppressive consequences" would follow if the Act were left in force, 705 F.2d at 1510, quoting, *Hazelwood Chronic & Convalescent Hospitals, Inc. v. Weinberger*, 543 F.2d 703, 708 (9th Cir. 1976), vacated on other grounds, 430 U.S. 952 (1977)).

179. See Michelman, *supra* note 173, at 1239, 1241.

180. 146 U.S. 387 (1892).

181. *Id.* at 452.

182. See *National Audubon Society*, 33 Cal. 3d at 437, 658 P.2d at 721, 189 Cal. Rptr. at 358.

183. *Id.*

184. See Sax, *Liberating the Public Trust Doctrine From its Historical Shackles*, 14 U.C. DAVIS L. REV. 185, 185 (1980) [hereinafter referred to as *Liberating*]; Deveney, *supra* note 84, at 16-36; see also Hannig, *The Public Trust Doctrine Expansion and Integration: A proposed Balancing Test*, 23 SANTA CLARA L. REV. 211, 214 (1983).

185. See Deveney, *supra* note 84, at 36-52; BosseLMAN, CALLIES & BANTA, *supra* note 80, at 53-60.

not for the exclusive use of the sovereign, but for the common use of all.¹⁸⁶ From this general principle, the United States Supreme Court in *Illinois Central* upheld the revocation of the grant of the Chicago waterfront to the Illinois Central Railroad Company.¹⁸⁷ In so doing, the Court held that those lands were inalienable except when alienation would further the public good.¹⁸⁸ The Court determined that the Illinois Legislature had not granted a clear title to the railroad.¹⁸⁹ Thus, Illinois was free to revoke the grant to the Illinois Central Railroad by exercising rights inherent in that part of the title not deeded.¹⁹⁰ Therefore, no taking requiring compensation had occurred.¹⁹¹

Near the turn of the century the California Supreme Court interpreted the public trust doctrine to protect the land covered by the navigable waters of the state,¹⁹² primarily for the purpose of preserving and improving navigation and fishing for the public.¹⁹³ This was consistent with the Roman concept of *res communis*,¹⁹⁴ common properties,¹⁹⁵ and with the *Illinois Central* case. In 1913, in *People v. California Fish Co.*,¹⁹⁶ the California Supreme Court endorsed the public trust doctrine as announced in *Illinois Central*.¹⁹⁷ The public trust doctrine was held to obligate the state to protect only navigation, commerce, and fishery.¹⁹⁸ The uses protected by the public trust remained linked to navigation¹⁹⁹ for several decades. Public trust uses were held to include the right to use the navigable waters of the state for hunting,²⁰⁰ fishing, boating,²⁰¹ and general recreational purposes²⁰² including bathing²⁰³ and incidental use of the bottom land.²⁰⁴

186. See *Illinois Central*, 146 U.S. at 457; Deveney, *supra* note 84, at 43-50.

187. *Illinois Central*, 146 U.S. at 459-60.

188. See *id.* at 453-56.

189. See *id.*

190. See *id.*

191. *Id.*

192. *People v. California Fish Co.*, 166 Cal. 576, 584, 138 P. 79, 82 (1913).

193. *Id.*

194. See Deveney, *supra* note 84, at 16-36; *Liberating*, *supra* note 184, at 185. "In the civil law, things common to all, that is, those things which are used and enjoyed by everyone, even in single parts, but can never be exclusively acquired as a whole, e.g., light and air." BLACK'S LAW DICTIONARY 1173 (5th ed. 1979).

195. JUSTINIAN INSTITUTES, 2.1.1-2.1.6, cited in, *Liberating*, *supra* note 184, at 185 n.1.

196. 166 Cal. 576, 138 P. 79 (1913).

197. *Id.* at 584, 138 P. at 82.

198. *Id.*

199. See *City of Long Beach v. Mansell*, 3 Cal. 3d 462, 482, 476 P.2d 423, 441, 91 Cal. Rptr. 23, 42 (1970).

200. *Forestier v. Johnson*, 164 Cal. 24, 40, 127 P. 156, 162-63 (1912).

201. *Bohn v. Albertson*, 107 Cal. App. 2d 738, 749, 238 P.2d 128, 136 (1951).

202. See *id.* at 749, 238 P.2d at 136, quoting, *Munninghoff v. Wisconsin Conservation Comm'n*, 38 N.W.2d 712, 715, 716 (Wis. 1949).

203. 107 Cal. App. 2d at 749, 238 P.2d at 136.

204. See *id.*; see also *People v. Mack*, 19 Cal App. 3d 1040, 1044-49, 97 Cal. Rptr. 448,

In 1971, in *Marks v. Whitney*,²⁰⁵ the California Supreme Court announced a fundamental change in the frame of reference used for identifying the uses of water that the public trust doctrine obligates the state to protect. The court held that the objectives of the public trust were no longer static, fixed, known quantities linked to navigation. Rather, the uses that the state must protect are defined by the ebb and flow of "changing public needs."²⁰⁶ *Marks v. Whitney* decreed that the changing public perception of values and uses of waterways²⁰⁷ obligated the state to preserve tide lands in their natural state to serve as "ecological units for scientific study"²⁰⁸ and for the environmental amenities²⁰⁹ that have become valued in the past twenty years.²¹⁰ Since the *Marks v. Whitney* decision, the California Supreme Court has used the public trust doctrine to protect the shores of San Francisco Bay from land fill development²¹¹ and to settle uncertainty regarding title to land between the low and high water mark along the shoreline of navigable nontidal waters.²¹²

450-53 (1971) (defining the pleasure boat test for navigation used in California).

205. 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971).

206. *Id.* at 259, 491 P.2d at 380, 98 Cal. Rptr. at 796. In changing the scope of the *res* of the public trust the court stated that "... in administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another." *Id.*, citing, *Colberg, Inc. v. The State of California*, 67 Cal. 2d 408, 421-22, 432 P.2d 3, 12, 62 Cal. Rptr. 401, 410 (1967). The *Colberg* case, however, did not redefine the *res* of the trust. *Colberg* merely recognized that the character of "commerce" changes over time. 67 Cal. 2d at 421-22, 432 P.2d at 12, 62 Cal. Rptr. at 410. *Colberg* did not add to "the traditional triad of uses—navigation, commerce and fishing." *National Audubon Society*, 33 Cal. 3d at 434, 658 P.2d at 719, 189 Cal. Rptr. at 356.

207. 33 Cal. 3d at 434, 658 P.2d at 719, 189 Cal. Rptr. at 356.

208. *Marks*, 6 Cal. 3d at 259, 491 P.2d at 380, 98 Cal. Rptr. at 796.

209. *Id.* at 260, 491 P.2d at 380, 98 Cal. Rptr. at 796.

210. All the environmental values that have received the attention of the public in the past generation cannot be listed. The values attached to and the uses for water are dynamic and change with the subjective perception of the public of the golden mean between a pristine "natural" environment and material needs that must be provisioned. See Walston, *The Public Trust in the Water Rights Context: The Wrong Environmental Remedy*, 22 SANTA CLARA L. REV. 63, 87 (1982). As a result, the California constitutional requirement of reasonableness varies and cannot be measured at any fixed point in time. See CAL. CONST. art. X, §2; CAL. WATER CODE §100; *supra* note 100; *Joslin v. Marin Municipal Water District*, 67 Cal. 2d 132, 140, 429 P.2d 889, 894, 60 Cal. Rptr. 337, 382 (1967); *Peabody v. City of Vallejo*, 2 Cal. 2d 351, 367, 40 P.2d 486, 491 (1934); *Natoma Water & Min. Co. v. Hancock*, 101 Cal. 42, 52, 35 P. 334, 337 (1894).

211. *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 534-35, 606 P.2d 362, 373-74, 162 Cal. Rptr. 327, 338-39 (1980).

212. *State v. Superior Court (Lyon)*, 29 Cal. 3d 210, 230-31, 625 P.2d 239, 251-52, 172 Cal. Rptr. 696, 708-09 (1981); *State v. Superior Court (Fogerty)*, 29 Cal. 3d 240, 243, 625 P.2d 256, 257, 172 Cal. Rptr. 713, 714 (1981); *accord City of Los Angeles v. Venice Peninsula Properties*, 31 Cal. 3d 288, 291, 644 P.2d 792, 793-94, 182 Cal. Rptr. 599, 600-01 (1982), *rev'd*, *Summa Corp. v. California ex rel State Lands Commission*, 104 S.Ct. 1751, 1755-58 (1984) (holding California cannot assert its public trust easement over property granted to private parties in confirmation proceedings pursuant to the 1848 Treaty of Guadalupe Hildago, 9 Stat. 922).

Imposing this amorphous concept of the "changing public needs" on water rights will have an unknown impact on the certainty essential²¹³ to the beneficial use of water. What is known is that water rights granted after 1971²¹⁴ are limited by this new public trust obligation of the state to protect the changing needs, values, and uses of the waterways not encumbered by the notions of navigation, commerce, and fishing. Contrary to the assertion of the California Supreme Court, until 1971 the scope of the preexisting title in the state was limited to protecting the interest of the public in navigation, commerce, and fishing.²¹⁵ The grant to the water rights holder in the Model Scenario, with a priority²¹⁶ date before 1971,²¹⁷ was not burdened with this expanded obligation in the state to protect the changing needs, values, and uses of waterways unencumbered by the three traditional classifications. Rather, the grant to the water rights holder in the Model Scenario was burdened by a public trust that gave the state the power to act within the trust "... purposes of commerce, navigation and fisheries for the benefit of all the people of the state."²¹⁸ The state may expand the scope of the rights it will retain on granting property rights.²¹⁹ Applying the expanded definition of the public trust retroactively in derogation of exercised property rights, however, is a taking requiring compensation.²²⁰ For the state to apply this new defini-

213. California Water Code section 109 in part provides: "The Legislature hereby finds and declares that the growing water needs of the state require the use of water in an efficient manner and that the efficient use of water requires certainty in the definition of property rights to the use of water . . ." See *Arizona v. California*, 103 S. Ct. 1382, 1392 (1983); *People v. Shirokow*, 26 Cal. 3d 301, 310, 605 P.2d 859, 865-66, 162 Cal. Rptr. 30, 36 (1980); *In re Waters of Long Valley Creek Stream System*, 25 Cal. 3d 339, 355-57, 599 P.2d 656, 666, 158 Cal. Rptr. 350, 360 (1979); TRELEASE, *supra* note 88, at 11; Walston, *Supra* note 210, at 91.

214. After *Marks*, a new water rights holder could be charged with prior notice that the judicial policy of the California courts was to give claims diffusely held by the public equal consideration in the resolution of disputes regarding use of common resources. See 6 Cal. 3d at 260, 491 P.2d at 380, 98 Cal. Rptr. at 796; Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 162 (1971) [hereinafter referred to as *Public Rights*].

215. See *Illinois Central*, 146 U.S. at 452, 457; *Colberg*, 67 Cal. 2d at 417, 432 P.2d at 9, 62 Cal. Rptr. at 407; *California Fish*, 166 Cal. at 584, 138 P.2d at 182. The California Supreme Court asserted that the *res* of the trust has not been limited by the traditional uses of navigation, commerce, and fishing. *National Audubon Society*, 33 Cal. 3d at 434, 658 P.2d at 719, 189 Cal. Rptr. at 356. This assertion is at odds with the cases leading to *Marks v. Whitney*. See *supra* notes 192-204 and accompanying text and note 206.

216. "Priority of an appropriative right is the superiority of the right over all rights of later priority when the available water supply is not enough for all." 1 HUTCHINS, *supra* note 99, at 226 (emphasis in original). An application for a permit to appropriate water, properly made, gives the applicant a priority of right as of the date of the application. CAL. WATER CODE §§1450, 1455.

217. The priority of right of the licenses of Los Angeles Department of Water and Power is July 27, 1934. Appendix, *supra* note 38, at A-93, A-99.

218. *Colberg*, 67 Cal. 2d at 417, 432 P.2d at 9, 62 Cal. Rptr. at 407.

219. See *In re Yun Quong*, 159 Cal. 508, 512, 114 P. 835, 837 (1911).

220. See *supra* notes 127-79 and accompanying text.

tion of the public trust obligation retroactively in derogation of property rights that are the basis of substantial investment-backed expectations and avoid the compensation requirement, the property rights holder must have had prior notice of possible collective action.²²¹ An examination of the history of the water rights in the Model Scenario is instructive in determining if the water rights holder had received this prior notice.

2. Notice of Possible Collective Action

For the water rights holder in the Model Scenario, three dates are relevant. First, the water rights holder could be said to have been on notice in 1934, the priority date of his water right.²²² Second, notice could be charged to the water rights holder in the 1930s and early 1940s when substantial capital was invested²²³ by the water rights holder in reliance on his primary expectations concerning the use of the water. These positions, however, suffer from anachronistic reasoning. The significant environmental impact that would be caused by the diversions was known in 1934.²²⁴ The existing public perception of the values and uses of the waterways, however, was fundamentally different then, from what it is today.²²⁵ Had the environmental impact been considered fully in the 1934 permit hearing,²²⁶ undoubtedly the permits would have been approved.²²⁷ Today society recognizes diffusely held claims asserted by the public at large, in maintenance of aesthetic and environmental amenities, as public rights.²²⁸ In 1934, however, diffusely held claims were not recognized as public rights entitled to equal consideration in the resolution of conflicting claims to a common resource base.²²⁹ Specific rights had to be threatened before legal significance would be given to a claim.²³⁰ At the time the permits

221. See Michelman, *supra* note 173, at 1239.

222. See *supra* note 217.

223. See *supra* notes 147-58 and accompanying text.

224. See *City of Los Angeles v. Aitken*, 10 Cal. App. 2d 460, 464-65, 52 P.2d 585, 587 (1935); *National Audubon Society*, 33 Cal. 3d at 427-28, 658 P.2d at 713-714, 189 Cal. Rptr. 350-51.

225. In the past public values limited the public interest to economic concerns. Robie, *The Public Interest in Water Rights Administration*, 23 ROCKY Mtn. MIN. L. INST. 917, 933 (1977).

226. The California Supreme Court stated: "No responsible body has ever determined the impact of diverting the entire flow of the Mono Lake tributaries into the Los Angeles Aqueduct." 33 Cal. 3d at 447, 658 P.2d at 728, 189 Cal. Rptr. at 365.

227. Environmental and aesthetic values were not given the importance in 1934 that they are today. See Robie, *supra* note 225, at 933, quoting, NATIONAL WATER COMMISSION, NEW DIRECTIONS IN U.S. WATER POLICY 5 (1973).

228. See *Public Rights*, *supra* note 214, at 159.

229. *Id.*

230. Cf. 33 Cal. 3d at 428 n.7, 658 P.2d at 714 n.7, 189 Cal. Rptr. at 351 n.7 (that recreational opportunities would be diminished was not grounds to deny a permit in 1934).

for appropriation were approved, the water rights holder in the Model Scenario could have been charged with notice only by foreseeing the emergence of public values incompatible with his primary expectations.²³¹ This reasoning, however, is "fantastic when the conclusion depending from that premise is that we may now destroy [the water rights holder's] investment without compensating him."²³² Aside from the demoralizing effect on economic activity this reasoning would cause,²³³ the analysis implicitly assumes the water rights holder would invest nearly \$200 million,²³⁴ knowing in the future his investment would be rendered wholly useless without any form of compensation.²³⁵ This assumption directly challenges the requirement that a property holder is entitled to a reasonable rate of return on his investment²³⁶ and flies in the face of rational investment judgment. The assumption that the water rights holder would invest heavily in rights knowing they were going to be rendered valueless in a few years fails for lack of foundation, as do both of the responses to the prior notice question.

The third response to the prior notice question is, in reality, a method for determining how a water rights holder would be charged with notice. This response asserts that the water rights holder is not entitled to compensation if his expectations concerning the use of his property are inconsistent with public values that changed over time in a manner that gave notice to the water rights holder of the growing incompatibility.²³⁷ Changing public values that manifest themselves in a manner that provides notice serves two purposes. First, they define the obligation of the state to reassert its preexisting title. Second, they give notice to the water rights holder that his water right is subject to the expanded definition of the preexisting title of the state. Determining when a water rights holder is on notice, then, is viewed more clearly as an inquiry into the manner in which the changing public values can manifest themselves in a way that gives notice to the water rights holder of the expanded definition of the preexisting title in the state.

231. Cf. Michelman, *supra* note 173, at 1237 (similar analysis regarding the brickworks case, *Hadacheck v. Sebastian*, 239 U.S. 394 (1915)).

232. *Id.*

233. *Id.* at 1237 n.122.

234. Petition, *supra* note 35, at 3-4.

235. See generally *Penn Central*, 438 U.S. at 137 (suggesting that some alternative to compensation at the highest and best value of the property may circumvent the taking question).

236. *Id.* at 136; *TRIBE*, *supra* note 151, at 465.

237. See Michelman, *supra* note 173, at 1239-42.

3. *Public Values Changing in a Manner to Give Notice*

Knowing precisely the limits within which a water rights holder may generate protectible investment-backed expectations is difficult because the *res* of the public trust obligation is of an amorphous character.²³⁸ The water rights holder must rely on some legally significant event that can be the basis for both his notice of preexisting title in the state and for defining the extent of the title of the state in his water right. Changing public values might manifest themselves in two ways and still generate a legally significant event upon which the water rights holder can rely: legislative recognition, and judicial recognition. In the environmental context, both legislative and judicial recognition came about through public demonstration. Public demonstration, however, is not a sufficient means of generating a legally significant event upon which notice can be based.

a. *Public Demonstration*

Environmental rallies or other forms of public demonstration are not sufficient to give a water rights holder notice of preexisting title in the state.²³⁹ The water rights holder has no way of knowing whether the demonstrators represent a radical minority faction or a coalescing majority which, in time, will be of sufficient magnitude to impose an obligation on the state to protect the values for which they are demonstrating. Further, demonstrations by the public expressing generalized concern for an environmental issue do not provide the water rights holder with any insight into the public trust obligation of the state. Some particular issues may become focused through public demonstration. Public demonstrations, however, cannot generate objective standards by which the water rights holder could measure his conduct because environmental issues deal with changing public values and the delicate balance of nature. In a democracy, changing public values that are sufficient to receive legal protection are recognized in two ways: statutes are enacted to protect those values, and judicial doctrine gives legal significance to those values.

238. See *supra* notes 205-13 and accompanying text.

239. Cf. POMEROY, *supra* note 173, §597.

A . . . person obtaining any right in specific property, is not affected by vague rumors, hearsay statements, and the like, concerning prior conflicting claims upon the same property; and the reason is, that such kind of reports and statements do not furnish him with any positive information, any tangible clew, by the aid of which he may commence and successfully prosecute and inquiry, and thus discover the real truth;

Id. at 1118-19.

b. Legislative Recognition

In 1928, the California Legislature enacted, and the voters approved, a constitutional provision²⁴⁰ that was designed to govern and protect the water resources of the state. That provision recognizes that the right to divert and use water for reasonable and beneficial use is inherent in the California scheme of water rights.²⁴¹ Recognition of the water rights policy in the California Constitution is reflected in several provisions of the California Water Code.²⁴² The Legislature specifically has provided that the right to the use of water may be acquired²⁴³ through a system of permits²⁴⁴ and licenses.²⁴⁵ Once an appropriator was granted a license, it would be effective for as long as the water actually was diverted and used in conformity with the specific conditions of the license.²⁴⁶ By 1943, public values had coalesced into a sufficient force to cause the Legislature to mandate that the "public interest" be taken into account in the allocation of water resources.²⁴⁷ The Legislature, however, did not determine that considerations of "public interest" were sufficient to divest long relied on water rights.²⁴⁸ That question was left to the judiciary.

c. Judicial Recognition

As noted above, in 1971 the California Supreme Court determined that the public trust obligates the state to protect changing public values in the use of water resources.²⁴⁹ Not until 1983, in *National Audubon Society*, however, did the California Supreme Court decide that these shifting public values were of sufficient magnitude that they should be given legal significance. The court recognized these public values as a means by which to destroy water rights that had been the basis of distinct investment-backed expectations.

240. CAL. CONST. art. X, §2 (enacted as art. XIV, §3).

241. [T]he right to water or to use the flow of water in or from any natural stream or water course of this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.

Id.

242. See CAL. WATER CODE §§106.5, 1201, 1240, 1241, 1243, 1257, 1429, 1600, 1627, 1675.

243. "[T]he right to the use of water may be acquired by appropriation" *Id.* §102.

244. *Id.* §§1252, 1350, 1380, 1390, 1394, 1455, 1600.

245. *Id.* §§1455, 1600, 1610, 1627, 1675.

246. *Id.* §1627.

247. *Id.* §§1253, 1255-57.

248. See *id.* §§1253, 1255-1257.

249. See *supra* notes 205-10 and accompanying text.

In *Marks v. Whitney*²⁵⁰ the California Supreme Court determined that the tidelands in dispute were subject to the trust.²⁵¹ Neither Marks nor Whitney, however, had made substantial investment²⁵² in reliance on use of the disputed tidelands. Additionally, both parties were left with a residuum of land not subject to the public trust²⁵³ from which they could earn a reasonable rate of return.²⁵⁴ Distinct investment-backed expectations were not destroyed. Other decisions by the California Supreme Court also fail to give notice to the water rights holder that "it had become clear"²⁵⁵ that his diversions were so incompatible with "the changing public perception of the values and uses of waterways"²⁵⁶ that they could be destroyed²⁵⁷ without compensation.

In *City of Berkeley v. Superior Court*²⁵⁸ the California Supreme Court held that notwithstanding the rule of property doctrine,²⁵⁹ virtually all tidelands along the Pacific Ocean in California were subject to the public trust.²⁶⁰ Significantly though, the court held that "[p]roperties that have been filled, whether or not they have been substantially improved, are free of the trust to the extent the areas of such parcels are not subject to tidal action."²⁶¹ Substantially all investment-backed expectations were left intact.

In *State v. Superior Court (Lyon)*²⁶² and *State v. Superior Court (Fogerty)*²⁶³ the California Supreme Court held that owners of pro-

250. 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971).

251. *Id.* at 259, 491, P.2d at 380, 98 Cal. Rptr. at 796.

252. Other than Whitney's pier which extends into Tomales Bay, and necessitated an easement over Mark's parcel, neither party had made any improvements that were subordinated to the public trust. *See id.* at 266, 491 P.2d at 384, 98 Cal. Rptr. at 800 (map).

253. *Id.*

254. *See Penn Central*, 438 U.S. at 136-37.

255. *National Audubon Society*, 33 Cal. 3d at 426, 658 P.2d at 712, 189 Cal. Rptr. at 349.

256. *Id.* at 434, 658 P.2d at 719, 189 Cal. Rptr. at 356.

257. *See supra* notes 153-60 and accompanying text.

258. 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327 (1980).

259. [D]ecisions long acquiesced in, which constitute rules of property of trade or upon which important rights are based, should not be disturbed, even though a different conclusion might have been reached if the question presented were an open one, inasmuch as uniformity and certainty in rules of property are often more important and desirable than technical correctness. Thus, judicial decisions affecting the business interests of the country should not be disturbed except for the most cogent reasons, as where the evils of the principle laid down will be more injurious to the community than can possibly result from a change, or upon the clearest grounds of error.

Id. at 552, 606 P.2d at 372, 162 Cal. Rptr. at 337, *quoting*, *Abbott v. City of Los Angeles*, 50 Cal. 2d 438, 456-57, 326 P.2d 484, 494-95 (1958).

260. *City of Berkeley*, 26 Cal. 3d at 535-36, 606 P.2d at 626, 162 Cal. Rptr. at 338-39; *accord Venice Peninsula*, 31 Cal. 3d at 302-03, 644 P.2d at 801, 182 Cal. Rptr. at 608, *rev'd*, *Summa Corp. v. California ex rel State Lands Commissioner*, 104 S.Ct. 1751, 1753 (1984).

261. *City of Berkeley*, 26 Cal. 3d at 534, 606 P.2d at 626, 162 Cal. Rptr. at 338.

262. 29 Cal. 3d 210, 625 P.2d 239, 172 Cal. Rptr. 696 (1981).

263. 29 Cal. 3d 240, 626 P.2d 256, 172 Cal. Rptr. 713 (1981).

perty littoral to Clear Lake and Lake Tahoe, respectively, hold title to their property subject to the public trust.²⁶⁴ The court, however, specifically allowed land owners who had previously constructed docks, piers, and other structures in the shore zone to continue to use these facilities,²⁶⁵ subject to the shifting values of the public trust.²⁶⁶ If the state decides that the continued existence of these previously constructed docks, piers, and other structures is inconsistent with the obligations imposed by the public trust, the state must compensate the landowners for improvements they have constructed in the shore zone.²⁶⁷ Compensation was required for the exercise of the public trust.

National Audubon Society is unique in both California and American jurisprudence. *National Audubon Society* is the first case to hold that the public trust doctrine imposes on the state an obligation to protect water,²⁶⁸ not land, to whatever extent is necessary to protect the changing public perception of the values and uses of waterways.²⁶⁹

Cases holding that tidelands, which have been filled by riparian owners, are freed of the trust,²⁷⁰ and cases holding that the razing of improvements on littoral land subject to the trust requires compensation²⁷¹ do not express judicial recognition of changing values in a manner that gives notice²⁷² to the water rights holder in the Model Scenario. Not until 1971 in *Marks v. Whitney* did the California Supreme Court rule that the changing public perceptions of the values and uses of the waterways define the parameters of the public trust obligation of the state. Another twelve years passed before the *National Audubon Society* decision notified water rights holders that the changing public values generated a legally cognizable obligation in the state to divest water rights without compensation when those water rights conflict with changed public needs. Both the *Marks v. Whitney*

264. *Lyon*, 29 Cal. 3d at 323, 625 P.2d at 252, 172 Cal. Rptr. at 708; see *Fogerty*, 29 Cal. 3d at 244, 625 P.2d at 257, 172 Cal. Rptr. at 714 (holding the primary issues are the same as in *Lyon*).

265. 29 Cal. 3d at 250, 625 P.2d at 261, 172 Cal. Rptr. at 718-19.

266. See *id.*

267. *Id.*

268. Other cases state that the public trust doctrine protects water. Each of these cases, however, rests upon the constitution of the respective state. See *North Dakota State Water Comm'n v. Bd. of Managers*, 332 N.W.2d 254, 258 (N.D. 1983); *Wisconsin's Environmental Decade, Inc. v. Dept. of Natural Resources*, 271 N.W.2d 69, 72 (Wis. 1978); *United Plainsmen Ass'n v. North Dakota State Water Conservation Comm'n.*, 247 N.W.2d 457, 461 (N.D. 1976).

269. *National Audubon Society*, 33 Cal. 3d at 434, 658 P.2d at 719, 189 Cal. Rptr. at 356.

270. *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 534-35, 606 P.2d 362, 373, 162 Cal. Rptr. 327, 338 (1980).

271. *Fogerty*, 29 Cal. 3d at 249, 625 P.2d at 261, 172 Cal. Rptr. at 718-19.

272. See Michelman, *supra* note 173, at 1239.

and the *National Audubon Society* modifications of the public trust doctrine are significant legally in defining the permissible scope of the distinct investment-backed expectations of the water rights holder. The first of these modifications, however, came a decade *after* the water rights holder had made his most recent investment in reliance on the only expectations permissible under his license.²⁷³ Notice *after* the fact does not obviate the need to compensate²⁷⁴ the water rights holder in the Model Scenario.

CONCLUSION

Mono Lake is a scenic beauty that should be preserved for the public benefit. Continued diversions of 100,000 acre-feet per year²⁷⁵ will alter the environs of the lake radically.²⁷⁶ The California Supreme Court, acting to protect the changed public values regarding Mono Lake, held that the state, by reasserting a "preexisting" title, could divest water rights to protect the public trust.²⁷⁷ Because the state was merely reasserting a preexisting title, the state was not engaging in a taking for which compensation is required. An analysis of the preexisting title rationale, however, has revealed that in 1934, when the water rights holder in the Model Scenario obtained his water rights, the part of the title retained by the state under the public trust was limited to the interests of the public in navigation, commerce, and fishing.²⁷⁸ This definition of the title retained by the state was expanded radically in 1971, in the case of *Marks v. Whitney*.²⁷⁹

The California Supreme Court, in *Marks v. Whitney*, defined the public trust as an obligation in the state to protect the changing public needs, values, and uses of the waterways unencumbered by the traditional classifications.²⁸⁰ The part of the title retained by the state in the water rights granted to the water rights holder in the Model Scenario did not give the state power to prohibit, at some time in the future, uses of the water rights that were vested and which were inconsistent with the expanded definition as announced in *Marks v. Whitney*.²⁸¹

273. See *supra* notes 153-60 and accompanying text.

274. See Michelman, *supra* note 173, at 1239; *supra* notes 170-78 and accompanying text.

275. See Petition, *supra* note 35, at 4.

276. See *National Audubon Society*, 33 Cal. 3d at 429-31, 658 P.2d at 716-17, 189 Cal. Rptr. at 352-53.

277. See *id.* See *supra* notes 170-79 and accompanying text.

278. See *supra* notes 192-204 and accompanying text.

279. See *supra* notes 205-10 and accompanying text.

280. See *id.*

281. See *supra* notes 184-204 and accompanying text.

The state may apply the expanded definition of the public trust to water rights created before the *Marks v. Whitney* decision and avoid the compensation requirement in two circumstances. If the public trust historically had been so expansively defined, then assertion of rights by the state consistent only with the expanded definition would be no change in the law²⁸² and, therefore, not a taking requiring compensation.²⁸³ An examination of the public trust doctrine revealed that historically the *res* of the public trust had been defined as uses relating to navigation, commerce, and fishing.²⁸⁴ A second way the state may retroactively apply the expanded definition of the public trust and avoid the compensation requirement was explored.²⁸⁵ If, prior to a water rights holder having invested substantial capital in reliance on his water rights, he could be charged with notice that the expanded definition of the public trust would be applied to his water rights, then state actions consistent with only the expanded definition would not be a taking requiring compensation.²⁸⁶ Water rights holders, however, could not be charged with notice of the expanded definition until 1971.²⁸⁷ Not until 1983 could a water rights holder be charged with notice that the public trust imposed on the state a continuing obligation to *reconsider* water rights vested in the owners and relied upon by those owners as the basis for distinct investment-backed expectations.²⁸⁸ Defining the constitutional requirement to compensate in terms of the "changing public needs" is not only unwise policy²⁸⁹ for the water rights holder in the Model Scenario, this definition does not provide notice of the destructive public trust obligation until years after his most recent investments made in reliance on his expectations concerning the use of his water rights.²⁹⁰ The water rights in the Model Scenario are defined very precisely.²⁹¹ Therefore, prohibiting uses inconsistent with the public trust, in effect, prohibits any use of the water rights and constitutes a taking²⁹² requiring

282. See *supra* notes 174-78 and accompanying text.

283. See *supra* notes 127-78 and accompanying text.

284. See *supra* notes 192-204 and accompanying text.

285. See *supra* notes 170-79, 231-37 and accompanying text.

286. See *id.*

287. See *supra* notes 205-19 and accompanying text.

288. See *supra* notes 240-74 and accompanying text.

289. "[T]he mutability of a constitutional principle, based upon shifting political and social judgments undermines the chances for consistent application of the Constitution from one generation to the next, a critical feature of its coherent interpretation." Regents of the Univ. of the California v. Bakke, 438 U.S. 265, 299 (1978), citing Pollack v. Farmers Loan & Trust Co., 157 U.S. 429, 650-51 (1895) (White, J., dissenting).

290. See *supra* notes 271-72 and accompanying text.

291. See *supra* notes 122-26 and accompanying text.

292. See *supra* note 18.

compensation.²⁹³ The preexisting title theory of the public trust doctrine asserts retroactively that the water rights holder never possessed the property, therefore, compensation is not required when the state acts to protect public trust uses that conflict with the water rights.²⁹⁴ This contravenes the mandate of the fifth amendment.

[A] state cannot be permitted to defeat the constitutional prohibition against taking property by the simple device of asserting retroactively that all property it has taken has never existed at all.²⁹⁵

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293. See *supra* notes 149-64, 267-73 and accompanying text.

294. See *supra* notes 170-73 and accompanying text.

295. *Hughes v. State of Washington*, 389 U.S. 290, 296-97 (1970) (Stewart, J., concurring) (citation omitted).

